Supreme Court, U.S.
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No. 99-1570

In The Supreme Court of the United States

BAYER CORPORATION,

Petitioner,

v.

HOOVER COLOR CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Fourth Circuit correctly ruled that in a Robinson-Patman Act case summary judgment is not appropriate when disputed facts remain as to whether a seller's prices were the result of a good faith effort to meet the equally low price of a competitor under 15 U.S.C. §13(b).

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are identified in the caption of the case. Respondent, Hoover Color Corporation, is a closely held corporation. There is no parent corporation, nor is any of the stock in Hoover Color Corporation owned by a publicly held company.

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INTRODUCTION

Hoover Color Corporation was until 1996 one of several primary distributors of Bayferrox, a synthetic iron oxide pigment used to color paint, plastics, and building and concrete products. Hoover filed this action in the United States District Court for the Western District of Virginia against Bayer Corporation, the producer of Bayferrox. Hoover alleges that Bayer engaged in price discrimination, thereby violating the Clayton Act, as amended by the Robinson-Patman Anti-Discrimination Act, 15 U.S.C. §13. The district court granted summary judgment,[1] and Hoover appealed. The United States Court of Appeals for the Fourth Circuit reversed and remanded the case for further proceedings.[2]

The opening paragraph of the Fourth Circuit opinion explains the current status of the case:

> A buyer of synthetic iron oxide pigment brought this action asserting that the company selling the pigment engaged in discriminatory pricing in violation of the Robinson-Patman Act. The district court found that the seller established an affirmative defense by demonstrating that it set its prices in a good faith attempt to meet competition in the marketplace and,

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[1] The district court opinion is reported at 24 F. Supp. 2d 571 (W.D. Va. 1998), and is set out at Pet. App. 16a-42a of the appendix to Bayer's Petition for a Writ of Certiorari. For ease of reference, Hoover will refer to the same appendix.

[2] The court of appeals opinion is reported at 199 F.2d 160 (4th Cir. 1999), and is set out at Pet. App. 1a-15a.

> therefore, granted summary judgment. This "meeting competition" defense, however, requires proof of a good faith response not just to general competition in the market-place, but to the "equally low price of a competitor." Because disputed facts remain as to whether the seller's prices were the result of a good faith attempt to meet a competitor's prices, we reverse and remand for further proceedings. (Pet. App. 1a).

The case is now back in the district court. It is set for trial in September, 2000. Bayer has also asked that the district court consider several other bases for summary judgment that it did not decide in its initial determination (Pet. App. 21a).

JURISDICTION

Rule 10 of the Rules of the Supreme Court of the United States provides that this Court may grant a petition for a writ of certiorari only for compelling reasons. Bayer attempts to satisfy Rule 10 by stating the court of appeals decision is contrary to a decision of this Court, and that a split has developed among the circuits regarding summary judgment in cases in which the meeting competition defense has been raised.

Here, the Fourth Circuit actually relied on *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428 (1983), the decision that Bayer argues is contrary. (Pet. App. 4a-8a). The court found there were material facts in dispute that a jury should consider. (Pet. App. 11a-15a). It concluded "that at this juncture Bayer has not demonstrated its entitlement as a matter of law to the 'meeting competition' defense.

Accordingly, we reverse the district court's grant of summary judgment to Bayer on this basis." (Pet. App. 15a).

Because Bayer is not precluded at trial from trying to prove facts that support its meeting competition defense, there is no compelling reason for this Court to grant Bayer's petition for a writ of certiorari.

STATEMENT OF THE CASE

Standard of Review

When it reviewed the district court's grant of summary judgment on the basis of the meeting competition defense, the Fourth Circuit applied *de novo* the same standard that the district court had applied. *Sylvia Development Corp. v. Calvert County, Maryland*, 48 F.3d 810, 817 (4th Cir. 1995). The Fourth Circuit understood that a moving party is entitled to summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). "In considering a motion for summary judgment, 'the court is required to view the facts and draw inferences in a light most favorable to the nonmoving party. The plaintiff is entitled to have the credibility of all his evidence presumed.'" *Shaw v. Stroud*, 13 F.3d 791, 798 (4th Cir.) (citations omitted), *cert. denied*, 513 U.S. 813 (1994). In addition, "[s]ummary judgment is appropriate only where the record as a whole could not lead a rational trier of fact to find for the nonmoving party." *Tuck v. Henkel Corp.*, 973 F.2d, 371, 374 (4th Cir. 1992), *cert. denied*, 507 U.S. 918 (1993), *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49

(1986). A court must draw any permissible inference from the facts in the light most favorable to the nonmoving party. *Tuck v. Henkel Corp.* 973 F.2d. at 374, *citing Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986) (citation omitted).

Since defendants bear the burden of proving good faith, they "must show that the evidence of their good faith is 'so one-sided that . . . . [they] must prevail as a matter of law.'" *Anderson v. Liberty Lobby*, 477 U.S. at 251-52. Where there is evidence in the record that might support an inference of "good faith" in establishing a §2(b)[3] defense, the decision whether to draw such an inference is for a trier of fact, not a court as a matter of law. *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. at 451-52. In citing *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1048 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982), the Fourth Circuit realized that "even an 'admittedly small doubt' that a seller's price reductions were a good faith response to competition required reversal of the district court's judgment as a matter of law. . . ." (Pet. App. 8a).

Material Facts in Dispute

Bayer omitted in its petition the material facts the Fourth Circuit found disputed. Hoover now corrects that oversight.

Hoover maintains that Bayer used a volume-based discount incentive pricing system that discriminated against it in favor of its two larger competitors, Rockwood Industries

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[3] 15 U.S.C. §13(b).

(Rockwood) and Landers-Segal Company (Lansco). (Pet. App. 2a). "Under this system, the price each distributor paid for Bayferrox depended on the total amount of the product it purchased." (Pet. App. 2a). Hoover purchased considerably less Bayferrox than did Rockwood or Lansco, but paid substantially more for it. (Pet. App. 2a-3a). No distributor knew the discount level at which its competitors were permitted to purchase Bayferrox, nor any provision in the other distributors' contracts. (Pet. App. 3a).

"For invoicing purposes, the prices paid by each distributor were based on the volume purchased the previous year. If a distributor bought more or less Bayferrox than it had the previous year (thus entitling it to a different discount), Bayer did not charge or refund the difference to the distributor until the end of February of the following year." (Pet. App. 3a). Hoover believes that particularly because of the year's delay in obtaining benefit of a greater volume purchase, lower prices offered its larger competitors were not functionally available to it. (Pet. App. 3a).

Bayer's system of volume-based incentive discounts started in 1980. (Pet. App. 3a). At the same time, Bayer was building a large manufacturing plant in New Martinsville, West Virginia. (Pet. App. 3a). "Hoover maintains that Bayer pursued its volume-based pricing strategy, which assertedly substantially lessened competition among Bayferrox distributors and unfairly injured Hoover, in order to obtain the bulk orders necessary to make profitable the New Martinsville plant, with its attendant high fixed costs." (Pet. App. 3a).

Bayer claims its volume discounts "were a good faith response to competitive offers that were available to [its] distributors." (Pet. App. 11a). Bayer relied on evidence that

the iron oxide market was very competitive. (Pet. App. 11a). Bayer also posed two instances in which Rockwood and Lansco presented it with lower offers from a competitor and asked it to meet the lower price. (Pet. App. 11a-12a). Finally, Bayer offered proof that Rockwood and Lansco threatened to purchase less Bayferrox if prices were not lowered. (Pet. App. 12a). The Fourth Circuit did not find that such evidence justified summary judgment in favor of Bayer. (Pet. App. 11a-13a).

The court then observed the following:

> Moreover, and perhaps more importantly, Hoover has proffered significant and direct evidence which, if believed, could rebut Bayer's assertion of the § 2(b) defense. . . . Hoover first points to evidence related to a possible alternative motive for Bayer's volume-based discount pricing system. Hoover offered undisputed evidence that Bayer wanted to maintain a high volume of business in Bayferrox to make cost effective its large plant in New Martinsville. Indeed, several of Bayer's own executives so testified. For example, one explained that "the spirit behind all of the volume-based contracts was to begin to load the facility that we had just built" and affirmed that this goal continued through 1997. Another executive similarly testified that "the intent [of the volume-based discounts] . . . was to offer a structure that would give [Bayer] the volume utilization of the [New Martinsville] plant." Hoover maintains that this evidence demonstrates that Bayer's sole motive in using volume discount pricing was not to meet a competitor's price, but rather to develop the large

volume of sales necessary to utilize the New Martinsville plant profitably. (Pet. App. 13a).

The court continued, as follows:

Hoover also proffered evidence that the threats Bayer received from its larger distributors — that they would purchase less Bayferrox if no price reduction was forthcoming — may not have played a role in motivating Bayer's volume discounts. In his deposition testimony, Rockwood's president stated that Bayer "minimized" Rockwood's repeated general warning about the availability of lower-priced alternatives to Bayferrox and "didn't give [the warning] a lot of credibility." Bayer "basically said [substitution of lower priced imported iron oxide pigments] wasn't a big concern." Hoover also points to the fact that Bayer, not Lansco, initiated negotiations for the 1994 Lansco agreement. A possible inference from this uncontroverted fact is that Lansco did not have a lower offer from a competitor to motivate renegotiation of its contract with Bayer to obtain more favorable terms. A factfinder need not, but reasonably could, conclude that this undisputed evidence indicated that the threats of Bayer's distributors to change suppliers did not influence Bayer's pricing structure.

Furthermore, provisions in the 1985 and 1990 Rockwood-Bayer agreements lend additional support for the possible conclusion that Bayer did not create the volume-based discount pricing system to match the offers of a competitor. These agreements contain, in addition to the provision for volume discounts, a

separate express requirement that Rockwood provide Bayer the opportunity to match any lower price offer before Rockwood accepted such an offer. Thus, wholly apart from the volume-based discounts, the contracts provide an explicit mechanism for Bayer to receive and match competing offers. Given this evidence, a factfinder could reasonably determine that Bayer did not need or intend the volume discounts to match competing offers. (Pet. App. 14a-15a).

COMPELLING REASONS DO NOT EXIST TO GRANT A WRIT OF CERTIORARI

1. The Fourth Circuit Reversed The District Court Because Genuine Issues Of Material Fact Remain In Dispute

Bayer misstates the primary basis for the Fourth Circuit's reversal of the district court. At the outset of its opinion, the Fourth Circuit stated its rationale as follows: "Because disputed facts remain as to whether the seller's prices were the result of a good faith attempt to meet a competitor's prices, we reverse and remand for further proceedings." (Pet. App. 1a). The court later restated that "[t]he question before us then is whether the uncontroverted evidence establishes that Bayer set its volume-based discount prices in a good faith effort to meet an equally low price offered by a competitor." (Pet. App. 11a).

The Fourth Circuit makes it clear that it found material facts in dispute, without suggesting how a jury should resolve these disputed facts. The court repeatedly

used the term "at this juncture," (Pet. App. 12a[4], 15a[5]), to leave no doubt that its evaluation of the evidence applied to summary judgment only.

The Fourth Circuit also carefully worded the issue before the court as ". . . . whether the *uncontroverted* evidence establishes that Bayer set its volume-based discount prices in a good faith effort to meet an equally low price offered by a competitor." (italics added) (Pet App. 6a). Moreover, the court observed that ". . . Bayer cannot rely on these threats [from its distributors] to establish *incontestably* that its volume discounts constituted a 'good faith' attempt 'to meet an equally low price of a competitor.' 15 U.S.C. §13(b)." (italics added) (Pet. App. 12a). "Such evidence [from Rockwood and Lansco] *may well establish* the existence of a competitor's offer, or threatened offer, to which Bayer reasonably responded by increasing its prices." (italics added) (Pet. App. 12a). "Moreover, and perhaps more importantly, Hoover has proffered significant and direct evidence *which, if believed, could rebut* Bayer's assertion of the §2(b) defense." (italics added) (Pet. App. 13a). "On the present record, in view of the evidence as to the New Martinsville plant and its impact on Bayer's business, *a factfinder could reasonably conclude* that Bayer engaged in

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[4] "Bayer's evidence, at least *at this juncture*, however, is considerably less compelling than that in the case on which Bayer relies so heavily -- *Reserve Supply Corp. v. Owens Corning Fiberglass Corp.* . . ." (italics added).

[5] "For the foregoing reasons, we must conclude that *at this juncture* Bayer has not demonstrated its entitlement as a matter of law to the 'meeting competition' defense." (italics added).

volume discount pricing not to match a competitor's prices but simply to grow its business with the kinds of 'aggressive price reduction condemned by the Robinson-Patman Act. . . .'" (italics added) (Pet. App. 14a). "A *possible inference* from this *uncontroverted fact* is that Lansco did not have a lower offer from a competitor to motivate renegotiation of its contract with Bayer to obtain more favorable terms. *A factfinder need not, but reasonably could,* conclude that this *undisputed evidence* indicates that the threats of Bayer's distributors to change suppliers did not influence Bayer's pricing structure." (italics added) (Pet. App. 14a). "Furthermore, provisions in the 1985 and 1990 Rockwood- Bayer agreements lend additional support for the *possible conclusion* that Bayer did not create the volume-based discount pricing system to match the offers of a competitor." (italics added) (Pet. App. 14a-15a). "Given this evidence, *a factfinder could reasonably determine* that Bayer did not need or intend the volume discounts to match competing offers." (italics added) (Pet. App. 15a).

This Court need go no further to find a lack of compelling reasons for granting Bayer's petition for a writ of certiorari. In reaching its decision, the Fourth Circuit simply disagreed with the district court with regard to the existence of genuine issues of material fact under Rule 56. A denial of Bayer's petition for a writ of certiorari will return the case to the district court for a trial by jury. The jury, as factfinder, will resolve all disputed issues of fact. Accordingly, there is no compelling reason for the Court to intervene at this time. Bayer's petition for a writ of certiorari should be denied.

2. The Decision Of The Fourth Circuit Does Not Conflict With Relevant Decisions Of This Court

Even if this Court determines it necessary to inquire beyond the Fourth Circuit's finding of genuine issues of material fact as grounds to deny Bayer's motion for summary judgment, the Fourth Circuit's decision does not conflict with any relevant decision of the Court, especially *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428 (1983).

Bayer contends that the Fourth Circuit misconstrued the holding in *Falls City*. Bayer cites the following passage from *Falls City*:

> There is no evidence that Congress intended to limit the availability of §2(b) to customer specific responses. . . .Congress intended to allow reasonable pricing responses on an area-specific basis where competitive circumstances warrant them. . . . We conclude that Congress did not intend to bar territorial price differences that are in fact responses to competitive conditions.

460 U.S. at 448. (Pet.10).

According to Bayer, "[t]he Fourth Circuit's decision is at odds with this aspect of the *Falls City* holding because it requires defendants to show that their challenged prices are customer-specific responses to specific competitive offers." (Pet. 10). Bayer also implies that the Fourth Circuit placed undue reliance on the Court's decision in *FTC v. A.E. Staley Manufacturing Co.*, 324 U.S. 746, 753 (1945), wherein the Court held that the "[Robinson-Patman] Act thus places

emphasis on individual competitive situations, rather than upon a general system of competition."[6] (Pet.11 n.5).

According to the Court in *Falls City*, "[t]he 'facts and circumstances' present in *Staley* differ markedly" [from *Falls City* because] Falls City did not adopt an illegal system of prices maintained by its competitors." 460 U.S. at 442. In contrast to Bayer, Falls City was a small firm without the ability or resources to price on a customer-by-customer basis. *Id.* at 449, *citing* [as did Bayer at Pet. 13-14] *Callaway Mills Co. v. FTC*, 362 F.2d 435, 442 (5th Cir. 1966) ("*in some circumstances*, requirement of customer-by-customer pricing 'would be burdensome, unreasonable, and practically unfeasible.'") (italics added).[7]

What is most significant about the Court's decision in *Falls City* is that the Court observed that ". . . Congress [in

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[6] In *Staley*, the seller "had not priced in response to competitors' discrete pricing decisions, but from the outset had followed an industrywide practice of setting its prices according to a single, arbitrary scheme that by its nature *precluded* independent pricing in response to normal competitive forces." *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. at 441 (italics in original).

[7] The Fifth Circuit in *Staley* applied the same "reasonable and prudent person" standard as did the Fourth Circuit. 362 F.2d at 442. According to the court in *Callaway*, determination of "[good faith] must be made on a case by case basis . . . [taking into account] the totality of the circumstances." *Id.* The court found that the "multitude of carpets on the market" made individual competitive pricing "burdensome, unreasonable, and practically unfeasible." *Id.* Unlike the case below, the court in *Callaway* found "no rebuttal evidence whatsoever" contradicting the rationale for the volume discount schedule or the meeting competition defense.." *Id.* at 439, 440, 442.

amending the Clayton Act] intended to leave it a 'question of fact. . . whether the way in which the competition was met lies within the latitude allowed.'" *Id.* at 449, *citing* 80 Cong Rec 9418 (1936). The Court found territorial or area-wide pricing differences permissible when such differences are in fact responses to competitive situations. *Id.* at 448.

The Court, however, did not find that Falls City had established a meeting competition defense as a matter of law. *Id.* at 451. According to the Court, "[t]here is evidence in the record that might support an inference [of facts that would have led a reasonable and prudent person to conclude that its lower price would meet the equally low price of its competitors]. . . *but whether to draw that inference is a question for the trier of fact, not this Court.*" *Id.* at 451-52 (italics added). Similarly, in *Staley* the Court found that Congress left to the Commission (the factfinder) the determination of whether a person charged with a violation of §2(a)[8] acted in good faith to meet a competitor's equally low prices. *FTC v. A.E. Staley Manufacturing Co.*, 324 U.S. at 758.

Contrary to Bayer's assertions, *Falls City* and *Staley* re-enforce the principle of deference to the factfinder in resolving disputed issues involving the meeting competition defense under §2(b). As this Court stated in *United States v. United States Gypsum Co.*, 438 U.S. 422, 454 (1978) (*quoting Continental Baking Co.*, 63 F.T.C. 2071, 2163 (1963)), and as the Fourth Circuit found in denying Bayer's motion for summary judgment, ". . . good faith 'is a flexible and pragmatic, not technical or doctrinaire concept. . . . Rigid

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[8] 15 U.S.C. §13(a).

rules and absolutes are especially inappropriate in dealing with the §2(b) defense; *the facts and circumstances of the particular case, not abstract theories or remote conjectures, should govern its interpretation and application.*'" (italics added) (Pet. App. 6a-7a).

Relying upon Supreme Court precedent, the Fourth Circuit's analysis of the "facts and circumstances" appropriately found genuine issues of material fact awaiting resolution by a jury. Compelling reasons to grant Bayer a writ of certiorari do not exist.

3. The Fourth Circuit's Decision Does Not Conflict With Other Courts of Appeal

Bayer also contends that the decision of the Fourth Circuit conflicts with other courts of appeal on the issues of meeting competition and summary judgment. Pet. 13-19. Although Bayer cites various court of appeals decisions on meeting competition[9] and summary judgment[10], these cases all stand for the same basic proposition that the Fourth Circuit has adopted. Courts do not make factual determinations as a

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[9] *Callaway Mills Co. v. FTC*, 362 F.2d 435, 441-42 (5th Cir. 1966); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1046 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982); *Rose Confections, Inc. v. Amrosia Chocolate Co.*, 816 F. 2d 381, 390 (8th Cir. 1987); *Reserve Supply Corp. v. Owens-Corning Fiberglass Corp.*, 971 F.2d 37, 44-45 (7th Cir. 1992).

[10] *Reserve Supply Corp. v. Owens-Corning Fiberglass Corp.*, 971 F.2d 37, 42-43 (7th Cir. 1992); *Jones v. Borden Co.*, 430 F.2d 568, 573 (5th Cir. 1970); *Hanson v. Pittsburgh Plate Glass Indus., Inc.*, 482 F.2d 220, 226 (5th Cir. 1973), *cert. denied*, 414 U.S. 1136 (1974); *Cadigan v. Texaco, Inc.*, 492 F.2d 383, 385 (9th Cir. 1974).

matter of law as long as there exists more than a "mere scintilla" of doubt or contrary evidence. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

The cases Bayer cites do not conflict with the Fourth Circuit decision. In *Callaway Mills Co. v. FTC*, 362 F.2d at 439. 440 - 442, the Fifth Circuit found "undisputed facts" that the defendant exercised "good faith" in meeting competition. In *William Inglis & Sons Baking Co. v. ITT, 668 F.2d at 1047 - 1048*, the Ninth Circuit concluded that it "cannot say that this was the only reasonable conclusion [regarding the exercise of good faith]," and found that "[o]ur admittedly small doubt nonetheless precludes our acceptance of Continental's argument that JNOV was warranted because it established the meeting competition defense." *See also Cadigan v. Texaco, Inc.*, 492 F.2d 383, 385 (9th Cir. 1974) (court granted summary judgment because it found no genuine issue of material fact). In *Rose Confections, Inc. v. Amrosia Chocolate Co.*, 816 F. 2d at 390, the Eighth Circuit held that Ambrosia's evidence [as to meeting competition] "was insufficient, as a matter of law, to prove the defense." The Seventh Circuit, in *Reserve Supply Corp. v. Owens-Corning Fiberglass Corp.*, 971 F.2d 37 (7th Cir. 1992), awarded summary judgment on the meeting competition defense on facts that were far more persuasive than those in the case below. As the Fourth Circuit pointed out:

> Bayer's evidence, at least at this juncture, however, is considerably less compelling than that in the case on which Bayer so heavily relies — *Reserve Supply Corp. v. Owens-Corning Fiberglass Corp.* --- one of the very few instances in which a court has upheld summary judgment to a seller on the basis of the meeting competition defense (citation omitted). In

> *Reserve Supply*, the defendant sellers offered substantial evidence that a customer, or a potential customer, asked them to match a price offered by one of the sellers competitors. *See id.* at 44. Furthermore, the sellers demonstrated that, pursuant to their established practices, they had compared price offers to other reports of competitive prices in the marketplace to substantiate the bona fides of these offers before acting to meet the competitors prices. *See id.* Again, Bayer has offered no evidence equivalent to that offered by the sellers in *Reserve Supply*.

Pet. App. 12a-13a.

Bayer contends that the Fourth Circuit's standard for granting summary judgment under §2(b), which it argues the Eleventh Circuit shares, is contrary to holdings from the Fifth and Seventh Circuits. Pet. 15 - 19. Bayer alleges that the circuits differ on the role of intent in establishing "good faith" on summary judgment. Pet. 15.

Admittedly, the Fourth Circuit cites *Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414, 1425-26 (11th Cir. 1990) in support of its decision not to grant Bayer's motion for summary judgment. Pet. App. 7a-8a. Yet, what *Alan's of Atlanta* most importantly stands for is the fundamental principle that "[u]nder summary judgment a conclusion may not be established as a matter of law unless 'no genuine issues as to any material fact' exist." *Id. at* 1425 (citing *Fed.R.Civ.P. 56(c)).* The court in *Alan's of Atlanta,* as did the Fourth Circuit in the case below, found that "plenty of these genuine issues exist." *Id.*

Bayer alleges that the Seventh Circuit in *Reserve Supply* has set a different standard than the Fourth Circuit or the Eleventh Circuit for determining whether to grant summary judgment. It is interesting that the Seventh Circuit case that Bayer so covets cites *Alan's of Atlanta* in its discussion of grants of summary judgment when issues of good faith and belief are involved. *See Reserve Supply Corp. v. Owens-Corning Fiberglass Corp.*, 971 F.2d at 42. In addition, the Seventh Circuit cites in *Reserve Supply* both *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986)* ("the [defendants] must show that evidence of their good faith is 'so one-sided that . . . [they] must prevail as a matter of law'") and *William Inglis & Sons Baking Co. v. ITT Continental Bak*ing Co., 668 F.2d 1014, 1047-48 (9th Cir. 1981),*cert. denied,* 459 U.S. 825 (1982 ("refusing to direct a judgment on section 2(b) defense for baking company when there was an 'admittedly small doubt' about its discount verification procedures'"). The difference between *Alan's of Atlanta* and *Reserve Supply* is not the legal standard that the respective circuits applied, but the different "facts and circumstances" in the two cases.

The approach of the Fourth Circuit and the Fifth Circuit is also consistent with respect to grants of summary judgment in meeting competition cases. In *Jones v. Borden*, 130 F.2d. 568, 574 (5th Cir. 1970), the court relied on Rule 56 and ruled that "[i]n the absence of any evidence to question or contradict Borden's good faith, we conclude that the district court properly granted the motion." In the other Fifth Circuit case that Bayer cites, *Hanson v. Pittsburgh Plate Glass Indus., Inc.*, 482 F.2d 220, 226 (5th Cir. 1973), *cert. denied*, 414 U.S. 1136 (1974), the court granted summary judgment because of an absence of conflicting evidence. However complicated a comparison Bayer makes of these cases, the

underlying principle is that the existence or nonexistence of material facts in dispute always determines the result on a motion for summary judgment.

CONCLUSION

Bayer has not provided compelling reasons to justify an award of a writ of certiorari. The Fourth Circuit reversed the district court's grant of summary judgment because genuine issues of material fact remain disputed and are ripe for resolution by a jury. Hoover respectfully requests that the Court allow it to bring its case to trial.

Bayer's petition for a writ of certiorari should be denied.

Respectfully submitted,

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